No. 89-1839

IN THE

Supreme Court of the United States

October Term, 1989

BLUE CROSS AND BLUE SHIELD OF KANSAS, INC.; and HMO KANSAS, INC.,

Petitioners,

vs.

WALTER L. REAZIN, M.D.; HCA HEALTH SERVICES OF KANSAS, INC., d/b/a Wesley Medical Center; HEALTH CARE PLUS, INC.; and NEW CENTURY LIFE INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Blue Cross and Blue Shield of Kansas, Inc. ("Blue Cross"), and HMO Kansas, Inc., petitioners, submit this reply to the brief in opposition of respondents.

During preparation of the petition for a writ of certiorari, yet another Court of Appeals decision has been issued reinforcing and deepening the conflict among the circuits created by the decision of the Tenth Circuit in this case. *United States v. Syufy Enterprises,* — F.2d —, 1990-1 Trade Cas. (CCH) ¶ 69,018 (9th Cir. May 9, 1990). The brief in opposition of respondents does not address the *Syufy* decision or most of the other circuit court decisions in conflict with

the Tenth Circuit's decision in this case. Nor does the brief in opposition satisfactorily address the irreconcilable conflict between the Tenth Circuit's decision and this Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 58 U.S.L.W. 4547 (May 14, 1990) ("*ARCO*") — that the antitrust injury for which damages have been awarded in this case is the result of an increase in competition, a price reduction to meet the lower non-predatory prices of competitors.

I.
THE SYUFY DECISION FROM THE NINTH CIRCUIT FURTHER DEEPENS THE CONFLICT AMONG THE CIRCUITS ON THE ISSUES PRESENTED BY THIS PETITION.

This petition asks this Court to grant certiorari in order to declare that preferred provider arrangements in health care, the leading means of containing health care costs today in the United States, do not violate sections 1 and 2 of the Sherman Act. The decision in this case has created a conflict in the circuits on this issue. Except for the Tenth Circuit's decision in this case, every court that has considered preferred provider arrangements of the type at issue here has upheld their validity under the antitrust laws. *Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986); *Barry v. Blue Cross of California*, 805 F.2d 866 (9th Cir. 1986); *Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196 (7th Cir. 1985); *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989), cert. denied, 110 S.Ct. 1473 (1990); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433 (5th Cir. 1984), cert. denied, 469

U.S. 1160 (1985); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982).

Except for *Ball Memorial*, respondents' brief in opposition fails to deal with any of these decisions. As to *Ball Memorial*, respondents assert only that "the Tenth Circuit did not find *Ball Memorial* applicable and unpersuasive — which might create a circuit split. Rather, it found the case 'distinguishable.'" Brief in Opposition, p. 8. This is not so. Although it attempted to distinguish *Ball Memorial*, the Tenth Circuit ultimately disagreed with the Seventh Circuit's decision:

> We thus agree with the district court that *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins.*, 784 F.2d 1325 (7th Cir. 1986), a case on which Blue Cross heavily relies, is distinguishable. In *Ball Memorial*, Blue Cross' market share was smaller (27% of all patients in Indiana) and the health insurance market was evidently more competitive, with some 1000 firms licensed to do business in Indiana, and more than 500 selling insurance at the time of the decision. To the extent that the *Ball Memorial* court opined that entry barriers in the health care financing market are *always* low, in any health care financing market in the country, we respectfully disagree.

Appendix to Petition ("App."), pp. 53b-54b, n. 32. Thus, the Tenth Circuit did "create a circuit split," to use respondents' language.

Moreover, the Tenth Circuit could "respectfully disagree" with the Seventh Circuit only because the Tenth Circuit fundamentally misapprehended the law of barriers to entry, in direct conflict with the recent Ninth Circuit decision in *Syufy* and other applicable decisions.

During its four weeks of deliberating, the jury in this case asked the trial court "whether entry barriers encompassed simply 'gaining a share of the market or does this refer to a new product simply being licensed into Kansas.' " App. p. 60b. The Tenth Circuit approved the trial court's response that " 'barriers to entry' fairly implies or assumes the ability to become a meaningful competitor." App. pp. 61b-62b. The Tenth Circuit approved this instruction even though the evidence in the case showed 200 insurance firms competing in Kansas, with no substantial barriers to entry.[1]

In essence, the Tenth Circuit found that the mere size and success of Blue Cross could constitute substantial barriers to entry supporting a finding of monopoly power, even though "only capital and licensing were necessary to initially enter the health care financing market."

This holding directly conflicts with the decision of the Ninth Circuit in *Syufy*. In the *Syufy* case, as here, there were "no structural barriers to entry into the market." 1990-1 Trade Cas. at p. 63,579. To counter this clear absence of structural barriers, in the words of the Ninth Circuit, "The government trots out a shop-worn argument we had thought long abandoned: that efficient, aggressive competition is itself a structural barrier to entry. According to the government, competitors will be deterred from entering the market because they could not hope to turn a profit competing against Syufy." *Id.* This argument the Ninth

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[1] "While it is true that only capital and licensing were necessary to enter the health care financing market, the fact remains that no other entrant remotely approached Blue Cross' domination of the market. That evidence cuts against the argument that entry barriers were insubstantial." App. p. 53b.

Circuit flatly and somewhat scornfully rejected. 1990-1 Trade Cas. at pp. 63,579-81.[2]

Yet this is exactly the same argument that the Tenth Circuit has adopted and approved in this case: that in the absence of structural barriers to entry, the jury might find entry barriers nonetheless in the market share and competitive success alone of Blue Cross. Because competitors could not compete successfully against Blue Cross, Blue Cross therefore had unlawful monopoly power, notwithstanding the absence of structural barriers to entry. This is exactly what the Ninth Circuit refused to countenance in *Syufy*. Because of this mistaken view of the law, in direct conflict with the Ninth Circuit, the Tenth Circuit has condemned as monopolistic a preferred provider arrangement that has had the effect of actually reducing hospital and health insurance costs for the people of Kansas.

To resolve this conflict in the circuits and to ensure that preferred provider arrangements, which in fact benefit consumers, are not improperly condemned under the antitrust laws, this Court should grant certiorari in this case.

II.

RESPONDENTS WHOLLY FAIL TO ADDRESS WESLEY'S RECOVERY OF DAMAGES BASED ON AN INCREASE IN COMPETITION, AND THE CONFLICT WITH THIS COURT'S DECISION IN ARCO.

In discussing *ARCO*, the respondents' brief in opposition simply ignores the basic facts of this case. They are that

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[2]"The government is not claiming that Syufy monopolized the market by being too efficient, but that Syufy's effectiveness as a competitor creates a structural barrier to entry, rendering illicit Syufy's acquisition of its competitors' screens. We hasten to sever this new branch that the government has caused to sprout from the moribund *Alcoa* trunk." 1990-1 Trade Cas. at p. 63,580.

Blue Cross proposed to the Saints a preferred provider arrangement whereby Blue Cross would sever its relationship with respondent Wesley and contract exclusively with the Saints in exchange for lower hospital prices. The Saints agreed. Blue Cross sent Wesley a notice of termination. The Saints lowered their prices to Blue Cross, which lowered its prices to subscribers. In an effort to keep business, Wesley lowered its own prices to match the non-predatory prices of the Saints. All hospitals lowered prices, all hospitals operated at a profit, and consumers of hospital services and health insurance paid less. On these facts, the antitrust injury claimed by Wesley, for which it was permitted to recover damages, was the difference between the profit Wesley would have had under its old higher prices, and the profits Wesley obtained under the new reduced prices, implemented to meet the lower non-predatory prices of the Saints.

As shown by Blue Cross in its petition, *ARCO* flatly holds that this is not antitrust injury. This Court said in *ARCO*, "Low prices benefit consumers regardless of how these prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence they cannot give rise to antitrust injury." *ARCO*, Slip Op. at 10. This Court also made clear that this is the law of antitrust injury regardless of the type of violation claimed. "We have adhered to this principle regardless of the type of antitrust claim involved." *Id.*

Neither respondents' brief in opposition nor the Tenth Circuit decision deals with these very basic facts and principles. Instead, the brief in opposition parrots the Tenth Circuit's "boycott" terminology and argument that Wesley's claimed injury is " 'inextricably intertwined' with Blue Cross'

anticompetitive conduct," and is therefore antitrust injury. Brief in Opposition, pp. 6-7. This approach is not helpful, and has been rejected by this Court in *ARCO*.

The term "boycott" has no antitrust significance here, inasmuch as all preferred provider arrangements consist of just such a "boycott," an agreement where a buyer restricts purchases to a limited number of suppliers in exchange for lower prices, thereby necessarily excluding other potential suppliers. In no sense, however, is this the type of boycott condemned by this Court. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), this Court made clear that antitrust illegality attaches only where "the boycott often cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete . . . and frequently the boycotting firms possessed a dominant position in the relevant market." Here, obviously, the Saints do not possess a dominant position in the market, with a combined share roughly equal to Wesley's, nor has Blue Cross patronage been termed an essential facility for a hospital.[3] Thus, mischaracterizing the arrangement here as a "boycott" does not cure the absence of antitrust injury.

Nor does calling the Wesley injury "inextricably intertwined with" or an "integral aspect of" Blue Cross' alleged violation make the loss antitrust injury within the meaning of *ARCO*. Wesley was permitted in this case to recover damages based upon price reductions it implemented to meet the lower non-predatory prices of the Saints. Try as they might, respondents cannot obscure this basic fact. Such

[3]This is not surprising, inasmuch as Blue Cross accounts for only about 18% of hospital revenues.

a recovery is exactly what *ARCO* prohibits. What was permitted here is antithetical to the very holding of *ARCO* and irreconcilable with this Court's decision.

Moreover, Wesley's reduction in prices was not "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Even under respondents' theory of this case, a price reduction to meet the non-predatory prices of rivals is not an injury linked to the claimed competitive foreclosure.

The foreclosure claimed by respondents is that Blue Cross entered into its preferred provider arrangement with the Saints order to "deter other hospitals from entering relationships with competitors of Blue Cross in health care financing." Brief in Opposition, p. 6. Were such a competitive foreclosure to have occurred, then Wesley's damage claim should have been for profits lost as a result of having been deterred from dealing with *other* health care providers in competition with Blue Cross. That was not, however, the claim made. Similarly, one would expect that competitors of Blue Cross would have asserted claims for profits lost as a result of not being able to contract with allegedly intimidated hospitals. Significantly, however, the leading competitor of Blue Cross in Wichita, respondent Health Care Plus, made no such claim and presented no evidence of damage; and the jury found not only no injury to Health Care Plus, but no intent of Blue Cross to cause injury. These are the type of injuries that would be expected to flow from that which made the conduct of Blue Cross allegedly unlawful. They were not the injuries claimed here.

Rather, the injury claimed here was an injury from lowering prices to meet non-predatory competitive prices, all of which directly benefited consumers of hospital care and health insurance. This is the precise injury *ARCO* holds cannot be antitrust injury, regardless of how it may arise. Respondents have simply failed to address this crucial point, which puts this case directly in conflict with *ARCO*.

CONCLUSION

Accordingly, for all of the foregoing reasons and those stated in their petition, petitioners respectfully pray this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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Dated this 6th day of June, 1990.